Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

STEFANIE A. BRAND
ACTING PUBLIC ADVOCATE &
DIRECTOR DIVISION OF RATE COUNSEL

Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101
(973) 648-2690 - Phone
(973) 624-1047 - Fax
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

On the Comments:

Christopher J. White, Esq.
Deputy Ratepayer Advocate

Date: January 28, 2010

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I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks public input in response to its Further Notice of Proposed Rulemaking ("FNPRM")[1] that proposes to adopt interim measures to address decision by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit" or "Court") in *Qwest Communications International, Inc. v. FCC* remanding the Commission's rules regarding the universal service non-rural high-cost support mechanism.[2] During the past several years, Rate Counsel has participated in various Commission proceedings seeking to address the Court's remand and to reform the Commission's non-rural high-cost support mechanism,[3] and welcomes the opportunity to participate in this proceeding. However, the

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[1] / In the Matter of High-Cost Universal Service Support, FCC WC Docket No. 05-337; Federal-State Joint Board on Universal Service, FCC CC Docket No. 96-45, *Further Notice of Proposed Rulemaking*, rel. December 15, 2009 ("FNPRM").

[2] / *Qwest Corp. v. FCC*, 398 F 3d 1222 (10th Cir. 2005) ("Qwest II")

[3] / *See, e.g.*, Initial Comments of the New Jersey Division of Rate Counsel in WC Docket No. 05-337/CC Docket No. 96-45, March 27, 2006 ("Remand Comments"); Reply Comments of the New Jersey Division of Rate Counsel in WC Docket No. 05-337/CC Docket No. 96-45, May 26, 2006 ("Remand Reply Comments"); Initial Comments of the New Jersey Division of Rate Counsel on the Joint Board Recommended Decision in WC Docket No. 05-337/CC Docket No. 96-45, April 17, 2008 ("Rate Counsel Recommended Decision Comments"); Reply Comments of the New Jersey

Commission should take immediate steps to prevent the "interim" high-cost mechanism from continuing indefinitely.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.[4] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices."[5] New Jersey consumers are net contributors to the high-cost fund and, as such, have an interest in ensuring that the high-cost fund is sufficient but not excessive. Ultimately, consumers foot the bill for universal service charges. The Commission's decisions regarding high-cost funds will affect New Jersey's consumers and competitive landscape.

II. BACKGROUND AND SCOPE OF PROCEEDING

In its *Ninth Report and Order* (1999), the Commission established a forward-looking federal

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Division of Rate Counsel on the Joint Board Recommended Decision in WC Docket No. 05-337/CC Docket No. 96-45, June 2, 2008 ("Rate Counsel Recommended Decision Reply Comments"); and Comments of the New Jersey Division of Rate Counsel in WC Docket No. 05-337/CC Docket No. 96-45, May 8, 2009 ("Remand Refresh Comments") responding to the Commission's Notice of Inquiry to refresh the record regarding Qwest II remand issues. In the Matter of High-Cost Universal Service Support, WC Docket No. 05-337, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 09-28, *Notice of Inquiry*, rel. April 8, 2009 ("Remand Refresh NOI").

[4] / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

[5] / *N.J.S.A.* 48:2-21.16(a)(4) and *N.J.S.A.* 48:2-21.16(b)(1) and (3).

high-cost support mechanism for non-rural carriers[6] and a nationwide cost benchmark that was set at 135% of the national average cost per line to determine support.[7] The *Ninth Report and Order* was remanded by the Tenth Circuit in 2001, after the Court determined that the Commission had failed to define "sufficient" and "reasonably comparable" adequately[8] and failed to provide sufficient rationale for its 135% benchmark.[9] In addition to requiring the Commission to define the statutory terms and to provide adequate justification for the level of support selected on remand, *Qwest I* also required the FCC to develop mechanisms to induce state action with regard to the development of their own universal service programs and to explain its plan for all universal service mechanisms, as a whole, more fully.[10]

The Commission issued its *Order on Remand*, in response to *Qwest I* in October 2003. In its *Order on Remand*, the Commission adopted a rate review and expanded certification process "to induce states to ensure reasonable comparability of rural and urban rates in areas served by non-rural carriers."[11] The Commission defined "sufficient" as "enough federal support to enable states to achieve reasonable comparability for rural and urban rates in high-cost areas served by non-rural

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[6] / Non-rural carriers are defined as ILECs that do not meet the definition of a rural telephone company. Federal-State Joint Board on Universal Service, FCC CC Docket No. 96-45, *Order on Remand*, 18 FCC Rcd 22559 (2003) *remanded, Qwest II, 398 F. 3d 1222* ("Order on Remand"), at note 1, citing 47 U.S.C. § 153(37). As explained by the Commission, "rural telephone companies are incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of the three alternative criteria." *Id.* Rural carriers serve fewer than twelve percent of lines. *Id.*

[7] / *In the Matter of Federal-State Joint Board on Universal Service*, FCC CC Docket No. 96-45; *High-Cost Universal Service Support*, FCC WC Docket No. 05-337, *Notice of Proposed Rulemaking*, rel. December 9, 2005 ("2005 NPRM"), at para. 3.

[8] / *Qwest II*, at 1228, citing Qwest *Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001)("Qwest I").

[9] / *2005 NPRM*, at para. 4.

[10] / *Qwest II*, at 1228.

[11] / *2005 NPRM*, at para. 5.

carriers," and "reasonably comparable" by setting a national urban residential rate benchmark.[12] The Commission set a national urban *rate* benchmark at two standard deviations above the average urban residential rate and a *cost* benchmark based on two standard deviations above the national average cost.[13]

In February 2005, the Tenth Circuit remanded the Commission's *Order on Remand. Qwest II* held that the Commission had still failed to define "sufficient" and "reasonably comparable" stating that the Commission's definition of sufficient:

> . . . ignores the vast majority of § 254(b) principles by focusing solely on the issue of reasonable comparability in § 254(b)(3). The Commission has not demonstrated in the Order on Remand or the limited record available to this court why reasonable comparability conflicts with or outweighs the principles of affordability, or any other principles for that matter, in this context.[14]

The Court directed the Commission to define "sufficient" in a manner which "considers the range of principles" contained in the statute.[15] The Court further found that:

> . . . the Commission's selection of a comparability benchmark based on two standard deviations appears no less arbitrary than its prior selection of a 135% cost-support benchmark. On remand, the FCC must define the term "reasonably comparable" in a manner that comports with its concurrent duties to preserve and advance universal service.[16]

Thus, the non-rural high-cost support mechanism was deemed invalid.[17] The Court did, however, uphold the Commission's determination that states are not required to replace implicit subsidies with explicit subsidies and the Commission's requirements with respect to state certification of reasonably

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[12] / *Id.*

[13] / *Id.*

[14] / *Qwest II*, at 1234.

[15] / *Id.*

[16] / *Id.*, at 1237.

comparable rates.[18]

In 2005, the Commission issued a Notice of Proposed Rulemaking seeking comment on the issues raised by the Court,[19] and subsequently the Commission sought input on various comprehensive universal service reform proposals.[20] After several parties filed a petition for writ of mandamus with the Court in the *Qwest II* proceeding, the Commission agreed to release a Notice of Inquiry no later than April 8, 2009;[21] issue a Notice of Proposed Rulemaking no later than December 15, 2009; and issue a final order responding to *Qwest II* no later than April 16, 2010.[22]

In its *FNPRM,* issued on December 15, 2009, the FCC responds to the Tenth Circuit's concerns by making interim changes to the mechanism but tentatively finding that the mechanism "comports with the requirements of section 254" and thus that it is appropriate to continue its use "on an interim basis until the Commission enacts comprehensive reform."[23] The Commission "anticipates" that the National Broadband Plan[24] will "address the need to reform universal service funding to further the deployment and adoption of broadband throughout the nation" and thus that

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[17] / *2005 NPRM*, at para. 6.

[18] / *Id.*

[19] / *2005 NPRM.*

[20] / *FNPRM*, at para. 8, citing *Identical Support Rule Notice*, 23 FCC Rcd 1467; *Reverse Auctions Notice*, 23 FCC Rcd 1495; *Joint Board Comprehensive Reform Notice*, 23 FCC Rcd 1531; *Comprehensive Reform FNPRM*, 24 FCC6475.

[21] / The *Remand Refresh NOI* was released on April 8, 2009.

[22] / *FNPRM*, at para. 9.

[23] / *Id.*, at para. 3.

[24] / The National Broadband Plan was originally due to be filed with Congress on February 17, 2010. On January 7, 2009, the FCC requested that it be given until March 17, 2010 to submit the plan to Congress. Letter to Honorable John D. Rockefeller, Chairman, Committee on Commerce, Science and Transportation, United States Senate from Julius Genachowski, Chairman, Federal Communications Commission, January 7, 2010.

reform to the non-rural high-cost mechanism should not be undertaken at this time.[25] The Commission must address the Court's remand by April, 2010, which the Commission indicates does not afford it adequate time to implement comprehensive USF reform based on its National Broadband Plan, to be completed only a month earlier. For this reason, the Commission has proposed interim changes in its remand *FNPRM.* [26]

III. COMMENT

The Commission should not wait any longer to begin the process of transitioning high-cost funds from support for voice service to support for broadband.

The Commission notes in the *FNPRM* that many commenters have recommended that the Commission transition high-cost funding from support of voice to support of broadband services.[27] Rate Counsel reaffirms its repeated recommendation that the Commission eliminate non-rural high-cost support.[28] There is simply no evidence that high-cost support is necessary in order for non-rural carriers to provide the basic loop at just and reasonable rates nor that high-cost support has resulted in lower rates.[29] Indeed, there is no evidence that costs are related to rates and it is difficult to justify the continued flow of high-cost funds to carriers whose rates have been deregulated as a result of purported competition.[30]

The Commission states that it is "reluctant" to make any changes to the non-rural high-cost mechanism that "would increase significantly the amount of support non-rural carriers would

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[25] / *FNPRM*, at para. 12.

[26] / *Id.*

[27] / *Id.*, at para. 11.

[28] / Rate Counsel Remand Refresh Comments, at 11.

[29] / *See, e.g., id.*, at 11-12; Rate Counsel Recommended Decision Comments, at 43.

receive."[31] Rate Counsel concurs entirely that it would be inappropriate to increase non-rural high-cost support: The Commission should reject any proposals that increase high-cost funding for voice services. Rate Counsel reiterates its recommendations that the Commission should eliminate the non-rural high-cost fund, that "instead the funds should be used to subsidize broadband deployment in unserved and underserved areas"[32] and that the Commission should expand its proposal for a pilot Lifeline broadband project to all low-income consumers.[33]

The Commission should focus rate comparability and affordability analyses on broadband services.

As time passes, it has become ever more important that the Commission focus on the goal of ensuring that all consumers (rural, urban, low-income) have access to affordable broadband services at reasonable upload and download speeds. As noted in the *FNPRM*, basic local telephone service has been ubiquitously deployed and the penetration rate is high.[34] Rate Counsel stated in 2009: "The focus of universal service funding, therefore, should shift to broadband service in order to ensure sufficient support and reasonable comparable access by all consumers throughout the country to affordable broadband service."[35]

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[30] / *See, e.g.*, Rate Counsel Remand Refresh Comments, at 11-12.

[31] / *FNPRM*, at para. 13.

[32] / In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-51, Comments of the New Jersey Division of Rate Counsel, June 8, 2009, at 29.

[33] / *Id.*

[34] / *FNPRM*, at para. 32.

[35] / Rate Counsel Remand Refresh Comments, at 7.

The Commission tentatively concludes that it should continue to require states to review residential local rates and certify that they are reasonably comparable.[36] The Commission also seeks input on whether the rate comparisons should compare bundled telecommunications services in lieu of stand-alone services.[37] As noted by the Commission, several commenters, including Rate Counsel, have previously observed that where bundles from intermodal providers are available, these rates generally are set at the regional or national level and therefore, where available, rural rates should be determined to be comparable.[38]

If the Commission undertakes a comparison of bundled rates, the Commission should ensure that comparisons include packages with same or similar services. In addition, the Commission should retain a comparison of "barebones" services for those consumers that do not demand bundled services. The Commission seeks data on pricing and availability of bundled services.[39] The carriers themselves are in the best position to provide such data. Rate Counsel also urges the Commission to seek data from carriers regarding demand for bundled offerings and demand for "barebones" basic local service so that the Commission, in coordination with states, can assess the evolution of the structure of the local market (and specifically consumers' demand for stand-alone basic local service). Ultimately, however, states have ratemaking authority and the Commission must not jeopardize that authority by imposing excessive uniformity in rates. States ultimately should retain

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[36] / *FNPRM*, at para. 14.

[37] / *Id.*, at para. 15.

[38] / *Id.*, at para. 19 and footnote 49, citing Rate Counsel's Remand Refresh Comments (at 7) noting that wireless carriers and VoIP-based services offer plans that do not distinguish between rural and urban service areas with respect to price. Rate Counsel noted that where customers still have limited incomes and do not buy bundles of services, access to voice and broadband services should be ensured through the use of expanded Lifeline support, not support to non-rural carriers. Remand Refresh Comments, at 7.

[39] / *FNPRM*, at para. 19.

authority over affordability issues and Rate Counsel recommends that the Commission acknowledge that the country has a long history of some rate variance, and, therefore, the achievement of "reasonable comparability" need not eliminate all variation.

The high-cost fund need not encompass all of the principles outlined in Section 254 of the 1996 Act.

Rate Counsel concurs with the Commission's assessment that:

> The non-rural high-cost support mechanism, thus, is just one relatively small segment of the Commission's comprehensive scheme to preserve and advance universal service. In implementing section 254, the Commission did not attempt to address and advance each and every section 254(b) universal service principle in a single support mechanism, nor is there any indication that Congress intended the provisions to be implemented in this manner. Instead, the Commission crafted a variety of mechanisms that – collectively – address the section 254(b) principles . . . In particular, the non-rural high-cost support mechanism was meant to ensure that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are reasonably comparable to rates in urban areas. Thus, the Commission believes that a fair assessment of whether the Commission has reasonably implemented the section 254 principles, and whether support is "sufficient," must encompass the entirety of universal service support mechanisms; no single program is intended to accomplish the myriad of statutory purposes. Moreover, the competing purposes of section 254 impose practical limits on the fund as a whole: if the fund grows too large, it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and requiring fair and equitable contributions from carriers.[40]

The Commission's conclusion to reject proposals that would distribute high-cost support at the wire center level is sound.

The Commission tentatively concludes that it should not modify the non-rural high-cost mechanism by basing support on average wire center costs per line.[41] The Federal-State Joint Board on Universal Service ("Joint Board") has concluded that proposals to distribute high-cost support on

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[40] / *Id.*, at para. 31 (notes omitted).

a wire center cost basis "neglect the economies of scale and scope inherent in non-rural LEC networks."[42] The use of wire centers as the foundation for computing support would cause high-cost subsidies to increase significantly, and as noted above, unnecessarily. Claims that current high-cost support is too low are unsubstantiated and should be dismissed.[43]

However, Rate Counsel does not agree that the weaknesses of the wire center proposals will be resolved if the Commission adopts an updated model that "incorporates the least-cost, most efficient technologies currently being deployed."[44] While the adoption of a new model may indeed lower the total costs the model produces, it does not solve the inherent flaw of excessive granularity. As Rate Counsel stated in 2008:

> By way of example, assume that an ILEC's serving territory consist of 6 wire centers, and the costs of serving customers in Wire Centers A though F are $10, $20, $25, $35, $40, and $50. Assume further, for sake of illustration, that the benchmark (that is the value which triggers HCF support) is $30. The average cost to the ILEC of serving customers is $30 in this simplified example (of course, in reality, the weighted average cost would likely be far less since there would be significantly more line in the low-cost urban areas). Based on an assessment of the area-wide cost of serving the ILEC's territory, the ILEC would not receive any HCF, which would be a fair and economically efficient result. The pretense of improved accuracy by further disaggregating the geographic area over which high cost need is assessed is misleading. The result is a heads-I-win tails-you-lose situation because for every wire center that is above cost there is another wire center that is below cost yet with the lopsided approach advocate by AT&T, ILECs would withdraw funds from USF for high cost but not put in for low cost. The impact of introducing granularity into the assessment of high-cost eligibility on the size of the high cost fund would be substantial, and is not necessary to achieve universal service goals.[45]

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41 / *FNPRM*, at para. 26.

42 / In the Matter of High-Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, FCC 07J-4, rel. November 20, 2007, at para. 41.

43 / Rate Counsel has provided a more thorough analysis of the wire center proposals in prior comments. *See, e.g.*, Rate Counsel Recommended Decision Comments, at 46-48; Rate Counsel Recommended Decision Reply Comments, at 58-63.

44 / *FNPRM*, at para. 27.

45 / Rate Counsel Recommended Decision Comments, at para. 47-48.

Therefore, Rate Counsel respectfully disagrees with the Commission's observation that there may be "considerable merit" to wire center proposals.[46] The Commission should not simply reject wire center proposals on an interim basis, but instead should reject it all together.

IV. CONCLUSION

Rate Counsel is pleased that the Commission is moving forward to address the Court's 2005 remand of the Commission's rules governing high-cost universal service for non-rural carriers. Rate Counsel is sympathetic to the Commission's stated goal of comprehensive reform of universal service funding and the impact that the National Broadband Plan will have on that effort.[47] However, the Commission should not continue high-cost funding for voice services in its present form even in the interim but should instead eliminate the mechanism. High-cost funds should be used to promote broadband deployment in unserved and underserved areas and affordability should be addressed through Lifeline and Link-up programs.

In addressing the Court's remand, the Commission should adequately explain that the entire universe of the multiple universal service programs collectively advance universal service, and, therefore, the non-rural high-cost fund should not be held up in isolation to fulfill entirely the congressional mandate to advance universal service. The use of universal service funds (no matter the service supported) should translate into tangible benefits for consumers and should not be considered a carrier entitlement.

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[46] / *FNPRM*, at para. 27.

[47] / *See Id.*, at para. 12.

Respectfully submitted,

STEFANIE A. BRAND
ACTING PUBLIC ADVOCATE &
DIRECTOR DIVISION OF RATE
COUSNEL
Christopher J. White
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Deputy Public Advocate
Division of Rate Counsel
31 Clinton Street, 11th Floor
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Newark, NJ 07101
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